



Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851



CONFLICT OF INTEREST OPINION EC-COI-89-19

FACTS:

You are an elected municipal council (Council) member. Your spouse is employed by a corporation (Corporation) in your community as a middle-management, non-executive position, receives a regular salary and participates in an employee stock ownership program.

To date, several hundred shares of common stock have been allocated to your spouse's account under the Corporation's Plan (Plan). These shares of common stock are held by a trustee and are not readily available to your spouse for sale until he/she retires or leaves the employ of the Corporation. He/she does not receive dividends on these shares. In addition to the employee stock program, your spouse owns other shares of common stock outright. The combined total number of shares of stock held by your spouse equals less than 1% of the total outstanding stock of the Corporation.

The planning board (Board) in your municipality has proposed temporary zoning changes and intends to propose to your Council a permanent zoning ordinance for this area.

The proposed zoning ordinance will restrict future development and land use in the area. At present, the land may be used for business, office, educational, research and development and heavy industrial uses. The new business uses would include business, office, educational, retail, research and development, but not heavy industrial use. Parking capacity will be restricted by two-thirds. Currently, the building height is not restricted. Under the proposed ordinance, building height will be restricted to a range of 40 to 120 feet, depending on the relationship of the building to nearby residential areas. Size of the floor area will also be decreased. Neither you nor your spouse owns any property in this area or any property abutting this area.

The Corporation is one of approximately five major landowners in this district and operates a portion of its business in this district. The Corporation's use is consistent with the proposed land uses in the new ordinance. The Corporation has not indicated any future development plans in this district or when any plans may be implemented.

QUESTION:

Does G.L. c. 268A permit you to participate as a member of the Council in the decision on the proposed zoning ordinance where your spouse holds common stock in the Corporation which could be affected by the proposed ordinance?

ANSWER:

Yes, subject to the limitations discussed below.

DISCUSSION:

As an elected member of the Council, you are a municipal employee for the purposes of G.L. c. 268A. Two sections of G.L. c. 268A are relevant to your question.

1. Section 19

Section 19(a) provides in pertinent part that no municipal employee may participate as such an employee in any particular matter[1] in which she or a member of her immediate family[2] has a financial interest. Proposed zoning amendments are considered to be particular matters for purposes of G.L. c. 268A. See, EC-COI- 84-76 (zoning matters before a city council); 85-22 (zoning amendments to town's protective zoning by-law). The definition of participation includes participating in the formulation of a matter for a vote, as well as voting on the particular matter. See, *Graham v. McGrail*, 370 Mass. 133, 138 (1976).

Therefore, you must abstain from official participation in the proposed zoning decision if your spouse has a direct or reasonably foreseeable financial interest in the enactment of the ordinance. EC-COI-84-96; 84-98. Section 19 encompasses any financial interest without regard to the size of said interest. However, the financial interest must be direct and immediate or reasonably foreseeable. See, EC-COI-86-25 (city councillor required to abstain from participating in school committee appointment as school committee reviewing specific provisions that may affect councillor's employer); 82-34 (financial interest in pending lawsuit that may include money damages); 84-96 (financial interest where municipal employee's land abuts and opposite to land to be developed).

Financial interests which are remote, speculative, or not sufficiently identifiable do not require disqualification under G.L. c. 268A. EC-COI-84-98; 87-16. Since neither his/her position or salary would be affected by the zoning ordinance, a determination of the foreseeability of your spouse's financial interest involves his/her status as an investor and thus hinges upon the effect of the ordinance on the Corporation. Your spouse would have a foreseeable and sufficiently identifiable financial interest if the potential impact of the ordinance on the Corporation's business would be such that a reasonable investor would consider it material in determining whether to buy, sell or hold stock. See, *Basic Inc. v. Levinson*, 108 978,983 (1988); *TSC Industries, Inc. v. Northway, Inc.* 426 U.S. 438,449(1976); *Securities and Exchange Commission v. Texas Gulf Sulphur*,

401 F. 2d 833, 849 (2d Ct. 1968) (material investor information includes facts affecting the probable future of the company). The Commission's standard of materiality regarding securities investments is consistent with that enunciated by the United States Supreme Court, in the context of withheld information under the securities laws. The Supreme Court recently stated that, "an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Basic Inc. v. Levinson*, supra (citing *TSC Industries, Inc. v. Northway*, supra).

For example, the zoning ordinance would probably affect the future of the Corporation's business if the real estate involved was their only business location or if the Corporation announced intentions to build a significant new facility in the area.

Similarly, an investor's financial interest would be implicated if the Corporation expressed plans for a new use or new technology and the ordinance restricted said use.⁹ In EC-COI-89-8, the Commission considered the financial impact of legislation on a family member's business. Abstention was warranted where the family member's decision to open his business depended on the enactment of the legislation. The potential effect of the legislation was to increase the number of people (i.e., customers) in the area of the business and to enhance the viability of the business.

The Commission concludes that your spouse's financial interest is not reasonably foreseeable because the effect of the proposed zoning changes on the Corporation's financial interest is not sufficiently identifiable. The proposed ordinance is not directed solely at the Corporation nor does it restrict any of the Corporations present business uses. Further, the proposed ordinance restricts but does not prohibit development. The Corporation has not stated its future development plans or its ideas for the area, so any impact on future business is unknown, nor has it expressed any plans to sell its property in the area.

2. Section 23

Section 23 contains general standards of conduct which are applicable to all public employees. It prohibits a public employee from

(2) use or attempt to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals;

(3) act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person.

Section 23 focuses not only on actual conflict of interest but also on appearances of conflicts. Therefore, you may not use your official position to secure an unwarranted privilege of substantial value for yourself, your spouse, or the Corporation, or to act in a

manner which would create a reasonable conclusion that you are likely to act as a result of your relationship with your spouse or the Corporation which employs your spouse. To avoid violating these restrictions, you must^[4]

- (a) publically disclose, prior to your participation in the zoning ordinance, your spouse's stock ownership and employment with the Corporation, and
- (b) base your evaluation and vote on the merits of the ordinance, using the same objective standards which the Council applies to other ordinances.

DATE AUTHORIZED: June 19, 1989

[1] "Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

[2] "Immediate family," the employee and his spouse, and their parents, children, brothers and sisters. Your spouse is an immediate family member.

[3] The Commission does not suggest that these examples are the only instances where investor's financial interest would be sufficiently identifiable.

[4] The Commission advises that public disclosure of your spouse's employment and stock interest is mandatory under these circumstances as the Corporation is one of a small number of landowners affected by the proposed ordinance. You should be careful that any action you take is impartial and that there is no basis for any perception that it is not. The proper procedure is to disclose in writing all of the relevant facts and to file the disclosure with the municipal clerk. Further, you should make a verbal public disclosure for inclusion in the meeting minutes prior to any official participation or action.